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The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community

R. NILS OLSEN, JR.*

ONE of the most serious, seemingly intractable problems confronting the Western New York community is the proliferation and concentration of commercial hazardous waste disposal facilities within the region.¹ The state's only active hazardous waste landfill is situated within the Niagara County towns of Lewiston and Porter.² A proposal to site within the landfill complex a hazardous waste incinerator facility with a capacity of 100,000 tons per year is currently pending.³ A small hazardous waste incinerator and hydrolysis unit is already in operation in the

* Professor of Law, State University of New York at Buffalo School of Law. Thanks to Michael B. Gerrard for his knowledgeable editorial assistance. Any errors are, of course, entirely the responsibility of the author. This article is dedicated to the citizen members of Residents Organized for Lewiston-Porter's Environment, Inc. (R.O.L.E.), a grassroots, community-based environmental group working to ensure ethical siting and the equitable geographic dispersal of commercial hazardous waste disposal facilities throughout New York State.

1. See *infra* note 56. In addition to the proliferation and concentration of hazardous waste disposal facilities, Western New York communities also confront efforts to site large, regional medical, discarded tires and solid waste disposal facilities in our midst. The dubious honor of hosting the state's low level nuclear waste facility is proposed for one of five sites located in either Cortland or Allegany Counties. These proposals are governed by separate siting procedures and are not addressed in this article. Their combined threat to the region cannot be underestimated, however.

2. C.W.M. Chemical Services, Incorporated, (C.W.M.), a subsidiary of Waste Management, Incorporated, operates the Model City landfill facility in Niagara County. Ironically, Model City was originally the intended site of a planned industrial community which would attract industry and residential population through the availability of free electrical energy, generated by a diversion of the Niagara River into a series of canals. The project, which was slowed by the 1890s depression, ended with the partial construction of the canal and the initial settlement of Model City. See generally A. GORDON LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* 9 (1982). The Utopian dreams of promoter William T. Love were never realized. What subsequently came to be known as the Love Canal was ultimately filled with toxic waste generated by local chemical companies. Model City is now home to the C.W.M. hazardous waste disposal facility and a large solid waste landfill. So much for utopian industrial dreaming in Niagara County.

3. The "Scoping Document" for C.W.M. Chemical Services, Incorporated, prepared for the New York State Department of Environmental Conservation, and distributed to the public at an informational meeting on June 7, 1990, see *infra* notes 9-12 and accompanying text, announced the proposal of C.W.M. to construct and operate two rotary kiln hazardous waste incinerators, with a combined capacity of approximately 100,000 tons of waste per year, at its Model City facility.

Erie County suburb of Clarence.⁴

Targeted communities rarely welcome proposed facilities such as these. Citizens share the perception that, at best, property values, population mobility and quality of life will be adversely affected, and that at worst, community health and safety will be compromised. State regulators from the Department of Environmental Conservation and the large commercial interests promoting the facilities lack credibility with local residents. Citizens often feel isolated and powerless to rebut extravagant and complex technical claims and to participate in an administrative process dominated by the industry and seemingly designed to freeze out meaningful public participation.

This article examines the issues surrounding community participation in the context of New York's process for siting hazardous waste treatment, storage and disposal facilities in general, and the proposed C.W.M. Niagara County hazardous waste incineration complex in particular.⁵ In Part I, the New York State siting process for such facilities is critically analyzed. In Part II, factors originating both within and without the state which contribute materially to the concentration of such facilities in Western New York are discussed. Part III describes the potential for local community opposition in an effort to suggest effective outlets for citizen opposition to such hazardous waste siting proposals.

I. THE PROCESS FOR SITING HAZARDOUS WASTE FACILITIES IN NEW YORK STATE

The process for approving proposed hazardous waste treatment, storage and disposal facilities is the joint responsibility of the Federal Environmental Protection Agency (E.P.A.), the New York State Department of Environmental Conservation (D.E.C.), and a Facilities Siting Board appointed by the Governor. The process runs on two parallel tracks—permitting and site approval by issuance of a certificate of environmental safety and public necessity. Permitting, which consists primarily of internalized administrative consideration of the applicant's proposal, addresses issues of technological suitability within the regulatory context.⁶ Public participation is effectively unavailable. The process

4. The facility, which recently expanded its incineration capacity, is operated by B.D.T., Incorporated.

5. *Supra* notes 2-3.

6. The proposed C.W.M. hazardous waste incineration facility requires a number of administrative permits and approvals, including: New York Part 373 Permit for a Hazardous Waste Disposal Facility; New York Part 201 Permit for Air Emissions Sources; a New York S.P.D.E.S. Permit

consists largely of private, cooperative interplay between federal and state bureaucratic regulators and their well-funded colleagues from the highly concentrated commercial toxic disposal industry.

The New York State process for siting hazardous waste disposal facilities, such as the proposed Niagara County incinerators, is statutorily mandated in the Environmental Conservation Law.⁷ As demonstrated by the on-going experience in Niagara County, this process is one which, by design and effectuation, seeks to disempower community representation.⁸ Nevertheless, there are opportunities for public involvement available to an organized community seeking to oppose a proposed facility.

The public process in the C.W.M. Niagara County incineration proposal began on June 7, 1990. The Federal E.P.A. and the State D.E.C. conducted a jointly sponsored "informational" meeting to present to the public statements concerning the proposed facility, the E.P.A.'s land disposal restrictions,⁹ and the D.E.C.'s hazardous waste management policies. This meeting presented a "soft sell" of hazardous waste incineration, with engineers representing the E.P.A., D.E.C. and C.W.M. assuring the two hundred attendees of incineration's proud position as the present "state of the art" disposal technology.¹⁰ The engineers gave extravagant assurances concerning the comparative safety of the process. Speaking in terms of risk analysis comparisons, they equated the dangers of hazardous waste incineration with eating a spoonful of peanut butter daily or taking a monthly transcontinental commercial plane flight between New York and Los Angeles.¹¹ Efforts were also made to discuss the state's "commitment" to equitable geographic siting of disposal

Modification; United States Environmental Protection Agency H.S.W.A. Permit; and a United States Environmental Protection Agency Toxic Substances Control Act Permit for a P.C.B. Disposal Facility. *See generally* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 621.1-.17 (1988), 624.1-.17 (1985), 361.4(g) (1982).

7. N.Y. ENVTL. CONSERV. LAW, §§ 27-1102, 27-1103, 27-1105 (McKinney Supp. 1991).

8. *See infra* notes 9-16, 49-52 and accompanying text.

9. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6924(d)-(m) (1984).

10. The significant involvement of C.W.M. public relations and engineering employees at a public "informational" meeting under the "neutral" sponsorship of the D.E.C. and E.P.A. is a graphic illustration of the congruence of interest and close cooperation between the regulators and the regulated. Such fraternization contributes significantly to the public's mistrust of the D.E.C.

11. The reliability of such risk assessments has been quite properly questioned as subject to the validity of the underlying assumptions. For instance, utilization as a meaningful benchmark of increased cancer risk, which requires years of exposure to toxins to be observed, may miss the mark. Incidence of pre-natal and perinatal abnormality and death, for example, focuses upon populations more immediately susceptible to environmental pollution of toxins and heavy metals.

facilities.¹²

Not surprisingly, these "informational" presentations were repeatedly interrupted by angry residents, expressing their outrage and frustration with the proposed facility and their shared skepticism concerning the administrators' credibility and sincerity. The meeting quickly took on an almost surreal appearance of a process intentionally designed to exploit and wear down the public's opposition. First, one administrative functionary would rise in front of the group, make a presentation, and then patiently endure the angry comments of the public with a world-weary yet attentive and understanding expression. When an appropriate pause in the angry crescendo occurred, this individual would be replaced by a second, and the process would continue. Ultimately, six repetitions of this scenario occurred. The dynamics of such a public process can perhaps best be described by a metaphor. The state provides a brick wall which is placed before the public. Individual citizens vent their anger and opposition to a proposed facility by physically lashing out at the wall. As it begins to fall, the barrier is replaced with yet another. The end result is inevitable—a dispirited public opposition, bloodied, exhausted and overwhelmed by the seemingly inexhaustible resources arrayed against it.

The next step in the procedure was the so-called "scoping" process.¹³ At public meetings, again conducted by the D.E.C. and held just one week after the information session, the public was encouraged to identify significant issues for C.W.M. to address in its Draft Environmental Impact Statement (D.E.I.S.), a document prepared by the applicant which purports to address (and seeks to trivialize) potential adverse effects on the local environment from the commercial incineration proposal.¹⁴ Meaningful citizen participation in this process was hamstrung by the lack of adequate notice. The first public announcement regarding the

12. This portion of the D.E.C. presentation was a very hard sell and was greeted with the scorn and disrespect it deserved. See *infra* text accompanying notes 58-62.

13. See generally N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.2(f), 617.7(b) (1987). The "scoping" process was defined in the "Scoping Document" as follows:

Public scoping is the process by which the NYSDEC as lead agency, together with the Public, identifies the significant issues to be addressed in the DEIS including where possible, the content and level of detail of the analysis, the range of alternatives, the mitigation measures to minimize or eliminate adverse impacts, and the identification of non-relevant issues. The scoping meeting is intended to encourage early public awareness and participation in the development of the Draft Environmental Impact Statement (DEIS) for the project.

Supra note 3. This rather abstruse description is not very useful for informing the general public.

14. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14 (1987).

meetings appeared in a full-page advertisement in a local community periodical published just two weeks before.¹⁵ Moreover, local residents lacked meaningful technical information. C.W.M. had not disclosed the identity of the toxic chemicals it intended to incinerate, projected transportation routes, the specifics of its planned emission control system, or any technical specifications of the proposed rotary kiln incinerators.¹⁶

Despite these significant impediments, more than three hundred members of the Lewiston-Porter community turned out for the meeting. Serious issues of public health, climatology, safety and quality of life were raised. Special concern was expressed for the possible dangers to the Lewiston-Porter Consolidated School District, with over 2,700 children in attendance, which is situated less than two miles from the proposed incinerators and which abuts the only available transportation routes.¹⁷ At the request of a local grass-roots environmental organization, Residents Organized for Lewiston-Porter's Environment, Inc. (R.O.L.E.), the period for the filing of written comments was extended from June 29, 1990 to July 31, 1990,¹⁸ and many thoughtful letters were submitted to the D.E.C. In addition, an experienced environmental attorney retained by the Towns of Porter and Lewiston and by Niagara County, appeared to resist the proposal.¹⁹

This represents the progress of the siting process to date.²⁰ There

15. 3 LEWISTON/PORTER SENTINEL, June 2, 1990, at 13.

16. The only available technical information provided the public was contained in the "Scoping Document", distributed at the June 7, 1990 "informational" meeting. See *supra* note 3. The information contained in this document was extraordinarily general and prevented any meaningful technical objections.

17. The vast majority of truck traffic bearing hazardous waste to the C.W.M. facility proceeds at least 55 miles per hour directly in front of the Lewiston-Porter Consolidated School District campus on New York Highway 18. During the period of April 1, 1989 to June 30, 1989, a total one way truck traffic of 5,489 trucks bearing waste to the landfill were reported by D.E.C. on-site monitors, a daily average of 78 trucks. Memorandum from Margaret Wooster, Erie and Niagara Counties Regional Planning Board, to Donald Yates, Superintendent of Lewiston-Porter Central Schools (Aug. 11, 1989).

18. The original truncated D.E.C. timetable, with public notice being afforded on or about June 2, 1990, with the "scoping" hearing conducted on June 14, 1990, and with written comments closed off on June 29, 1990, graphically demonstrates the lack of significance of the public input process to D.E.C. decision makers.

19. The towns and county retained Michael B. Gerrard, a partner in the New York City law firm of Berle, Kass & Case to resist the proposal. Gerrard previously represented the City of Niagara Falls, New York and Niagara County in the successful effort to block expansion of a second Niagara County commercial hazardous waste landfill, the CECOS facility located in the Town of Niagara. See Gerrard, *CECOS Landfill Victory!*, Toxics in Your Community Newsletter, Apr.-June 1990, at 1.

20. Jan. 23, 1991.

remains a long road to travel. The next step belongs to the D.E.C. which, after a review of all of the written and oral scoping comments, will issue a formal "scoping document" identifying the issues which are considered to be compelling and relevant enough to merit inclusion in the D.E.I.S.

C.W.M. will also play an important role in the drama. After receipt of the "scoping document", the applicant files with the D.E.C. the D.E.I.S. and formal application for a certificate of environmental safety and public necessity for their incinerators.²¹ If the D.E.C. finds the D.E.I.S. inadequate, it may require the applicant to supplement that document to provide more detailed information or to address further issues of potential adverse environmental impact.²²

Once the D.E.C. reaches a favorable determination regarding the application's completeness, it gives public notice of the proposal and informs the Governor of the need to form a Facility Siting Board.²³ This body must include the designees of the State Commissioners of Transportation, Environmental Conservation, Health and Commerce, the designee of the Secretary of State, and three ad hoc citizen members, at least two of whom must be residents of Niagara County.²⁴ Five of the eight persons on a Board constitute a quorum and the decision of five members constitutes action of the Board.²⁵ The Governor appoints a chairperson for the Board and the D.E.C. provides necessary (and theoretically impartial) technical support.

Once the Siting Board has been designated, the administrative hearing is convened. The first phase of the proceedings is legislative in nature. An "issues conference" is held at which interested groups and individuals may seek formal party status to ensure full participation in the process, and identify relevant issues they wish the Board to consider.²⁶ An Administrative Law Judge, appointed by the D.E.C. Commissioner,²⁷ rules on the threshold issues of party status and justiciable issues. This ruling is appealable to the D.E.C. Commissioner who, after submission of written arguments, renders a final administrative decision.

21. N.Y. COMP. CODES R. & REGS. tit. 6, § 361.3(e) (1982).

22. *Id.* §§ 361.3(f), 617.8(b)(3).

23. *Id.* § 361.3(g).

24. N.Y. ENVTL. CONSERV. LAW § 27-1105(3)(d) (McKinney Supp. 1991).

25. *Id.*

26. N.Y. COMP. CODES R. & REGS. tit. 6, § 361.4(d) (1982); *see also id.* § 624.

27. N.Y. ENVTL. CONSERV. LAW § 27-1105(3)(e) (McKinney Supp. 1991). The Administrative Law Judge presides at the Facilities Siting Board hearing and simultaneously considers any pending permitting issues. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 361.4(b) (1982).

The next phase is the adjudicatory hearing at which factual evidence concerning the identified, admissible issues is presented by all parties to the proceeding. This hearing is likely to be subdivided to consider discrete issues, such as transportation and health, and consists of traditional direct and cross-examination of witnesses and the introduction into evidence of voluminous documentary exhibits.²⁸

Once the adjudicatory phase of the hearing is completed, a transcript of the proceedings is prepared. All parties are then given an opportunity to submit formal post-hearing memoranda and replies to the arguments of their adversaries. The Administrative Law Judge then closely considers the evidence, exhibits and arguments and ultimately produces a lengthy written Recommended Decision.²⁹ This decision is rendered in the context of formal siting criteria enacted by the D.E.C.³⁰ pursuant to statutory authorization.³¹ These criteria encompass a broad range of factors including population density in areas neighboring the facility and transportation routes,³² risk of accident during transport of waste,³³ proximity to incompatible structures,³⁴ consistency with local land use plans,³⁵ risk of contamination of ground and surface waters,³⁶ risk of fires or explosion,³⁷ adverse fiscal impacts on the host community,³⁸ and potential negative environmental impact on the natural environment and ecology,³⁹ on public health and safety,⁴⁰ on scenic, historical, cultural and recreational resources,⁴¹ on water and air quality,⁴² on indigenous and endangered wildlife,⁴³ and on areas of mineral exploitation.⁴⁴ The Recommended Decision awards a weighted numerical score to each regulatory criteria, ranging between most and least

28. N.Y. ENVTL. CONSERV. LAW § 27-1105(3)(e) (McKinney Supp. 1991); N.Y. COMP. CODE R. & REGS. tit. 6, § 361.4(f) (1990).

29. N.Y. ENVTL. CONSERV. LAW § 27-1105(g) (McKinney Supp. 1991).

30. N.Y. COMP. CODES R. & REGS. tit. 6, § 361.7 (1990).

31. N.Y. ENVTL. CONSERV. LAW § 27-1103 (McKinney Supp. 1991).

32. N.Y. COMP. CODES R. & REGS. tit. 6, § 361.7(b)(1)-(2) (1990).

33. *Id.* § 361.7(b)(3).

34. *Id.* § 361.7(b)(4)-(5).

35. *Id.* § 361.7(b)(6).

36. *Id.* § 361.7(b)(7)-(8).

37. *Id.* § 361.7(b)(9).

38. N.Y. ENVTL. CONSERV. LAW § 27-1103(2)(g) (McKinney Supp. 1991).

39. *Id.* § 27-1103(2)(h).

40. N.Y. COMP. CODES R. & REGS. tit. 6, § 361.7(c)(4) (1985).

41. *Id.* § 361.7(b)(13)-(14).

42. *Id.* § 361.7(b)(10).

43. *Id.* § 361.7(b)(12).

44. *Id.* § 361.7(b)(11).

favorable impact, with any total score in excess of two hundred defeating a proposed facility.⁴⁵

In the event that the Administrative Law Judge renders a favorable siting decision, the opponents of the application may file exceptions to the Facilities Siting Board and D.E.C. Commissioner.⁴⁶ If a final decision approving the project results, full judicial review of the entire administrative process is available in the courts of the State of New York.⁴⁷

While it certainly appears that New York has in place a lengthy, complex, and seemingly comprehensive administrative process for the approval of proposed hazardous waste treatment, storage and disposal facilities, appearances can be deceiving. There are, in fact, serious flaws in the process, at least with respect to providing meaningful community participation and input on an issue of conceded public importance and interest.⁴⁸

As the experience in Niagara County highlights, the intended role of the impacted citizenry in the siting procedure is marginal at best. The community and public are disempowered and isolated. Meaningful notice of public meetings and fair opportunity to prepare are denied the public.⁴⁹ Community representation on the Facilities Siting Board is carefully limited and their votes are not necessary to constitute majority action. Most critically, New York State hazardous waste disposal siting law makes no provision whatsoever for technical support, either to municipalities threatened with such facilities or to the residents of those communities.⁵⁰ Effective input and participation, especially at the public "scoping" and administrative hearing stages, is clearly dependent upon access to knowledgeable and committed experts such as engineers, chemists, public health physicians, computer programmers, statisticians and

45. *Id.* § 361.7(c)(2)-(3); *see id.* at Appendix 17.

46. N.Y. ENVTL. CONSERV. LAW § 27-1105(3)(g) (McKinney 1984).

47. N.Y. CIV. PRAC. L. & R., Art. 78 (§ 7801-03) (McKinney 1981).

48. It is instructive that the only provision for local citizen participation in this process, apart from the three appointed members of the Facilities Siting Board, is the so-called Community Advisory Committees (CAC), mandated by N.Y. ENVTL. CONSERV. LAW § 27-1113 (McKinney Supp. 1991). These CACs, which are comprised of citizen representatives of host communities, are not provided any technical or legal assistance, are only formed *after* the proposed facility comes into existence, and have no real power other than to request consideration of permit modifications.

49. *Supra* note 18.

50. The D.E.C. has, pursuant to the requirements of N.Y. ENVTL. CONSERV. LAW § 27-1115 (McKinney 1987), prepared a report titled Recommendations for Assistance to Localities Affected by Hazardous Waste Management Facilities (Apr. 1988). Significantly, none of the recommendations, including one to award technical assistance grants to localities, has ever been acted upon. *Cf.* N.Y. ENVTL. CONSERV. LAW § 29-0509 (McKinney 1986) (providing financial assistance to local governments where low-level radioactive waste facilities are planned).

attorneys. Such individuals, if they can be found at all,⁵¹ are very expensive to retain. Grass roots environmental groups are unlikely to be able to raise the hundreds of thousands of dollars required. Volunteer assistance from within the community is a very poor substitute since, even when such professionals are available,⁵² they likely lack the specific expertise and time to provide meaningful input on a *pro bono* basis.

The effects of this denial of technical assistance to community-based opposition are heightened by the extraordinarily dominant role of the applicant in the process. From the outset, the factual submission available to the public and ultimately determinative of the issue is created by the applicant. Millions of dollars can be spent on in-house experts, environmental consulting firms and attorneys. Without a fair opportunity to rebut this presentation with opposing evidence presented by equally-skilled attorneys, the record from which the Administrative Law Judge and Facilities Siting Board reach their conclusions will be solely the product of the adversarial efforts of the applicant.

As might be expected, this void in resources is not filled by the Department of Environmental Conservation. The D.E.C. defines its role in the process as limited to ensuring that the applicant meets regulatory requirements. Thus, requests for assistance by oppositional community groups are dismissed as conflicts of interest.⁵³ Moreover, effective community assistance would violate a fundamental mission of the D.E.C., ensuring adequate commercial capacity to dispose of New York State's

51. Environmental consultants make their living in service of the commercial hazardous waste disposal industry and state and federal regulatory agencies. In the rare case of a municipality or citizen's group seeking technical assistance to resist a commercial hazardous waste disposal facility proposal, most consultants will see a potential conflict and refuse to jeopardize future relationships. In a recent siting proceeding, the municipality ultimately hired a Canadian consultant because of the unavailability of local firms.

52. Of course, most hazardous waste disposal facilities are sited in rural or relatively poor communities which are not likely to contain many of the relevant professionals. See, e.g., Hazardous Waste Sites and the Rural Poor, Clean Sites (Mar. 1990); Commission for Racial Justice of the United Church of Christ, Toxic Wastes and Race in the U.S. (1988). In this regard, at least, the Lewiston-Porter community in Niagara County is atypical. The membership of R.O.L.E. includes physicians, attorneys, engineers and other persons with relevant specialized knowledge.

53. During negotiations between the Lewiston-Porter, Niagara County Citizen's Advisory Counsel and C.W.M. concerning an expansion of the landfill (SLF #12), see N.Y. ENVTL. CONSERV. LAW § 27-1113 (McKinney Supp. 1991), *supra* note 48, requests for technical assistance were made by citizen representatives to a D.E.C. attorney. These requests were rebuffed as presenting a conflict of interest, since he had assisted C.W.M. on their application and, in any event, was present to represent the D.E.C., not the citizens. Interview with Mr. James Jackson, Chairman CAC (Jan. 23, 1991). Cf. Washington County Cease v. Persico, 120 Misc.2d 207, 227 (Sup. Ct. 1983), *aff'd*, 99 A.D.2d 923 (3d Dept. 1984), *aff'd*, 64 N.Y.2d 923 (1985); Oak Beach Inn Corp. v. Harris, 108 A.D.2d 796 (2d Dept. 1985).

hazardous waste. This mission gives the agency a congruence of interest with the commercial hazardous waste disposal applicant and leads inevitably to consultation, encouragement and assistance on the planning and development of proposed facilities.

To give the devil its due, the D.E.C.'s affirmative commitment to ensuring adequate hazardous waste disposal capacity and defeating expected local community opposition to proposed facilities, is informed by a sincere desire to ensure that such facilities fully comply with stringent administrative safety requirements. This mixed agenda provides little solace, however, for the Western New York community which already bears the burden of an extraordinarily disproportionate share of the hazardous waste disposal industry. Serious questions concerning equitable geographic distribution throughout the state of the pain inflicted by such facilities, and concerns over the long-term reliability of "state-of-the-art" technology and risk assessment-based assurances of safety, require a fair process in which those individuals most affected by the proposed facility can participate meaningfully and with respect.

II. INTERNAL AND EXTERNAL FORCES IMPACTING ON WESTERN NEW YORK'S ROLE IN HAZARDOUS WASTE DISPOSAL

The current New York State hazardous waste disposal siting process and its predecessors, as employed, have permitted a dramatic concentration of commercial waste facilities within the Western New York area. The New York State solution to the policy quandary of hazardous waste disposal siting has been one of unmitigated expediency. An unethical situation has been allowed to develop in which nearly all of the community loss associated with the commercial disposal of unwanted toxics has been concentrated in one small corner of the state, while the employment and economic benefits associated with the manufacturing processes producing waste are broadly dispersed. This result has been driven, in large part, by a combination of internal and external pressures.

A. *Internal Forces*

The presence of some hazardous waste disposal capacity in the Western New York community is, in part, a result of the presence of a fair quantity of hazardous waste in the area. Historically, inexpensive hydroelectric power and a central Great Lakes and rail transportation infrastructure fostered a primitive and aggressive primary manufacturing and chemical industry. Its legacy of indiscriminate dumping and toxic

pollution continues to plague Western New York.⁵⁴ Moreover, in excess of twenty percent of the hazardous waste generated in New York State continues to be produced in Erie and Niagara Counties.⁵⁵

Nevertheless, this fact alone can neither justify nor explain the presence of nearly all of the state's commercial hazardous waste disposal capacity in Western New York.⁵⁶ The availability of already polluted land, in conjunction with the need for facilities to accept waste from environmental remediation efforts and provide low cost hazardous waste disposal for local industry, unquestionably led to the reluctant opening of the region's door to such facilities. However, once opened, that door has been kept ajar by an alliance of convenience between the commercial disposal industry, the D.E.C. and elected state officials. The disposal industry logically prefers expansion at existing sites to the uncertainties and expense of creating new facilities in other locations. The D.E.C. can most efficiently discharge its mandate to ensure adequate disposal capacity by working with existing industry and overcoming local opposition to expansion rather than seeking the elusive goal of geographic dispersal.⁵⁷ The executive and legislative branches, driven by political expediency, can avoid hard decisions and maintain majority support by inaction, permitting the continued concentration of facilities in one small area of the state with relatively insignificant political power.

54. At the present time, the D.E.C. has identified 151 inactive hazardous waste disposal sites in Erie County and 132 inactive hazardous waste disposal sites in Niagara County. Out of a statewide total of 1,373, Erie and Niagara rank first and second, respectively, among all of the counties in the state. While some of these sites have not yet been officially tested, many pose a significant danger to community health and safety. See New York State Hazardous Waste Site Remedial Plan (Aug. 1989).

55. Revised Draft, New York State Hazardous Waste Facility Siting Plan and Environmental Impact Statement 4-31 (Aug. 1989).

56. This paper refers to concentration of commercial hazardous waste disposal facilities, as opposed to so-called "captive" facilities which dispose of the hazardous waste of a particular generator on-site. While large "captive" facilities exist in the Western New York community as well, significant public policy rationales favor such facilities over their commercial cousins. In general, New York State communities have welcomed industrial enterprise into their midst, benefitting materially from the associated employment opportunities and direct, positive effects upon the local economy. A necessary by-product of the manufacturing process is often generation of quantities of hazardous waste. On-site disposal of this waste significantly lessens transportation risks associated with shipment to commercial facilities. The paramount interest of dispersing the burdens of toxic waste disposal equitably throughout the state is served because of the natural dispersion of industrial generators. Moreover, the significant community costs associated with the disposal of toxic waste are most equitably borne by those areas directly benefitting from the manufacturing process which generated the toxics in the first place.

57. Similar regulatory propensities exist in the municipal solid waste arena. D.E.C. regulations affirmatively ease expansion of existing facilities. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, §§ 360-2.12(b), 360-2.12(c)(1)(ii), 360-2.12(c)(5), 360-2.13(i) (1989).

In 1987, the New York State Legislature addressed the need for a consistent, equitable statewide policy for hazardous waste disposal, and required the D.E.C. to adopt and implement a comprehensive Hazardous Waste Facility Siting Plan.⁵⁸ This Plan was to address the issue of geographic concentration of facilities with a somewhat ambiguous charge that the D.E.C. make "a determination of the number, size, type and location by area of the state of new or expanded . . . facilities . . . consistent with . . . an equitable geographic distribution of facilities."⁵⁹ To date, the D.E.C. has failed to comply with its mandate. While drafts were offered for public comment in June 1988 and August 1989, the D.E.C. has yet to promulgate a final Plan.⁶⁰

Most significantly, the drafts of the Hazardous Waste Facility Siting Plan ("draft plans") evidence a categorical unwillingness on the part of the D.E.C. to grapple with the issue of concentration of facilities in Western New York. The 1987 statute requires that, in considering the appropriate location of facilities, the siting plan should emphasize "equitable geographic distribution,"⁶¹ and thus reflect the comparative balance of the production of hazardous wastes throughout the state. As identified in the draft plans, three geographical areas within the state account for the bulk of New York's hazardous waste generation.⁶² Any notion of equity demands that future siting of commercial hazardous waste disposal facilities should be dispersed among these regions.

Unfortunately, the D.E.C. interpretation of its mandate to ensure equitable regional siting effectively stops with the identification of minimum recommended capacities for each region. By identifying only the minimum recommended capacity for each region rather than the maximum, the draft plans virtually ensure a continuation of the status quo. Existing facilities in Western New York, in order to capitalize on all available waste streams, will continue to seek expansion of capacities far beyond that necessary to dispose of the toxics locally generated, thereby effectively eliminating any incentive to develop new facilities in other ge-

58. N.Y. ENVTL. CONSERV. LAW § 27-1102 (McKinney Supp. 1991).

59. *Id.* § 27-1102(2)(f).

60. The D.E.C. was required to make final revisions in a draft plan and adopt a final plan within fifteen months after the effective date of the law (Dec. 1, 1987). *Id.* § 27-1102(6).

61. *Supra* note 59.

62. The geographical areas include: the western area (comprised of Niagara, Erie, Monroe and Chautauqua Counties). The central area (comprised of Broome, Onondaga, Steuben, Cayuga, Cortland, Tioga, Chemung, Oneida and St. Lawrence Counties); and the eastern area (comprised of Nassau, Suffolk, Dutchess, Albany, Queens, Rensselaer, Warren, Orange, Westchester, Schenectady, New York, Richmond, Kings and Rockland Counties.) Revised Draft, New York State Hazardous Waste Facility Siting Plan and Environmental Impact Statement, 4-51 (Aug. 1989).

ographic markets.⁶³ This result is exacerbated by the plans' reliance solely on market forces and enterprise decision to control new applications for disposal facilities without attempting to directly, or even indirectly mandate regionalization.

During the past election campaign for Governor, it became apparent that the ethical issue of geographic regionalization had diminished to the level of mere political rhetoric. Most disappointing was a letter mailed to Niagara County residents during the election campaign by Governor Cuomo, which criticized Niagara County's Republican State Senator for demanding action on regional equity, and denied responsibility for the failure to address the concentration of hazardous waste disposal facilities in Western New York.⁶⁴ If New York State is ever responsibly to resolve the hazardous waste dilemma, the Governor, D.E.C. and legislature must stop casting stones and making political hay. Instead, they must acknowledge the unacceptability of the current system and work together for an effective legislative response. At a minimum, such a response must establish a projected schedule for the development of facilities in regions outside of Western New York, and prohibitions on construction or expansion of facilities within this area until such alternative capacity has been put in place. Failure to pursue such a course will continue the *de facto* designation of Western New York in general, and Niagara County in particular, as the sacrificial dumping ground for all of the hazardous waste generated throughout the state which must be disposed of commercially.

The internal forces of political and regulatory expediency and inaction contributing to the concentration of commercial hazardous waste disposal facilities in Western New York are significantly enhanced by pressures originating outside the state's borders. Candor requires acknowledgement that, even if New York's policy makers one day seek to wrestle honorably with the siting issue, the attempt may be significantly impeded by these external forces.

63. The failure of the D.E.C. to adopt a final Hazardous Waste Facility Siting Plan which requires geographic equity has had a particularly devastating effect on continuing the concentration of such facilities in the Western New York community. Siting facilities are required by New York State law to take into account "[t]he consistency of the application with the plan adopted pursuant to Section 27-1102." N.Y. ENVTL. CONSERV. LAW § 27-1103(2)(a) (McKinney 1984). Section 27-1102 provides in part that there must be "an equitable geographic distribution of facilities." *Id.* § 27-1103(2)(f). The facilities siting board must deny applications which are not consistent with the plan or when the need for such facility is not identified in the plan. *Id.* § 27-1105(f).

64. Letter from Mario M. Cuomo, Governor of New York, addressed to Niagara County Resident (Aug. 7, 1990).

B. *External Forces*

In 1986, the United States Congress enacted the Superfund Amendments and Reauthorization Act (S.A.R.A.).⁶⁵ In pertinent part, S.A.R.A. requires each state to file with the E.P.A. a Capacity Assurance Plan which demonstrates an adequate projected capacity to dispose of the hazardous waste expected to be generated within the state for the next twenty years.⁶⁶ If a state does not provide such capacity assurances deemed adequate by the E.P.A., it is prohibited from receiving Superfund⁶⁷ money for remedial cleanup actions within the state.⁶⁸

In enacting this provision, Congress did not require any state to demonstrate the capacity to dispose of its hazardous waste in facilities located within its own borders.⁶⁹ S.A.R.A. permits states to satisfy capacity assurance requirements by entering into agreements or compacts with another state or group of states with excess capacity,⁷⁰ or by contracting with privately owned hazardous waste disposal facilities located in other states.⁷¹

New York State is one of a small minority of states whose imports and exports of hazardous waste are comparable. Its existing capacity for hazardous waste landfill and projected hazardous waste incineration are in privately owned facilities. The probable effects of the S.A.R.A. capacity assurance requirements on New York State are clear.

The majority of states, which have an absence or significant shortfall of in-state capacity to dispose of their hazardous wastes, may comply with the S.A.R.A. requirements in one of three ways. They may: (1) undertake the uncertain and immensely unpopular step of attempting to create new facilities for hazardous waste disposal within their own boundaries; (2) enter into interstate compacts with importing states; or

65. Superfund Amendments and Reauthorization, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

66. 42 U.S.C. § 9604(c)(9)(A) (Supp. V 1987).

67. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (Supp. V 1987).

68. CERCLA provides for two types of cleanup actions: remedial actions, which are generally long term or permanent containment or disposal programs, 42 U.S.C. § 9601(24) (Supp. V 1987); and removal actions, which are usually short term cleanup arrangements of a more immediate, or emergency nature, 42 U.S.C. § 9601(23) (Supp. V 1987). Inadequate capacity assurance plans disentitle a state from remedial action payments only. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985).

69. *See, e.g.*, 132 CONG. REC. S14,924 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee).

70. 42 U.S.C. § 9604(c)(9)(B) (Supp. V 1987).

71. *See, e.g.*, S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985); OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. E.P.A., ASSURANCE OF HAZARDOUS WASTE CAPACITY: GUIDANCE TO STATE OFFICIALS 3 (1988).

(3) contract with commercial facilities in other states to dispose of their waste. Options two and three are the most accessible and least painful to pursue. Either option would likely lead to an increase in the importation of waste from other states to New York facilities, which, as we have seen, are concentrated in the Western New York community. Such increases would unquestionably drive accelerated efforts to expand these existing facilities still further to accommodate both the local and interstate market demand.

New York State has recognized the difficult situation it faces nationally, and has taken steps to confront it directly. The state refused to join in any regional or joint compacts because it was clear that other states would rely on New York to handle much of the region's waste.⁷² The Capacity Assurance Plan filed by the D.E.C. with the E.P.A. on October 17, 1989, was "based upon the premise that all of the State's capacity needs after 1989 will be met with in-state capacity."⁷³ This in-state capacity projection was possible only because of a central and controversial assumption:

Management of imported wastes will be accomplished through cooperative agreements as authorized by federal law. New York will not allow hazardous wastes from other States to be managed in New York facilities except on a case-by-case basis under a cooperative agreement with the exporting State. Under any cooperative agreement, New York will require that its industries be allowed to send wastes to facilities in the cooperating State. New York will also require that an exporting State have in place a plan for reducing the generation of hazardous wastes within its borders. Other conditions benefitting New York communities may also be required.⁷⁴

New York State has sought to implement this assumption. On September 14, 1990, D.E.C. Commissioner Thomas C. Jorling announced an intention to issue new limitations on the permit of the state's only hazardous waste landfill, the C.W.M. facility located in Niagara County. These changes would sharply restrict the company's ability to accept inter-state shipments of hazardous waste for disposal unless the cooperative agreements envisioned by the Capacity Assurance Plan were obtained.⁷⁵

These permit restrictions will not, of course, directly affect the con-

72. D.E.C., Division of Hazardous Substances Regulation, Capacity Assurance Plan, at 2-1 (Oct. 17, 1989). See also Buffalo News, Oct. 20, 1989, at C2.

73. *Id.*

74. *Id.*

75. Letter from Thomas C. Jorling, D.E.C. Commissioner, to John Stanulonis, General Manager, C.W.M. Chemical Services, Inc., Model City Facility (Sept. 14, 1990).

centration of commercial hazardous waste disposal facilities in Western New York. If successful, however, the modifications would slow the area's inexorable progress towards becoming a regional dumping ground for toxic waste generated in the industrial midwest and northeast. They would also retard the need for continued, rapid expansion of capacity to accommodate an expanding interstate market. Given the practical impediments to a principled New York solution to geographic concentration,⁷⁶ such contractions in waste importation and market growth would seem to be necessary preconditions to maintaining the potential for equitable siting of facilities within the state.⁷⁷

There exists, however, a significant impediment to New York State's efforts in this regard. The permit modifications imposed by the D.E.C. upon C.W.M.'s hazardous waste landfill preserve capacity for New York-generated hazardous waste by directly limiting the interstate shipment of waste into the state. Several federal court decisions have struck down similar attempts by other importing states,⁷⁸ concluding that hazardous waste is an object of commerce; that selective bans on out-of-state waste violate the Commerce Clause of the United States Constitution;⁷⁹ and that Congress did not authorize such restrictions on interstate commerce by enacting the S.A.R.A. requirements for Capacity Assurance Plans.⁸⁰

The precise implication of the Commerce Clause in this setting is, of course, an inherently subjective determination.⁸¹ It may well be that a

76. See *supra* text accompanying notes 56-63.

77. An additional critical factor relating to achieving the ethical siting of commercial hazardous waste disposal facilities, which is beyond the scope of this paper, is securing significant reduction in the quantity of hazardous waste which is annually generated. Traditionally, New York State has allocated few resources and little effort to accomplish this difficult task; preferring instead to concentrate attention on the creation and expansion of disposal capacity. While this misallocation of resources must be challenged and altered, *compare* Chapter 831 of the Laws of 1990, the Western New York community must act now to resist the further proliferation of facilities. Otherwise, equitable geographic dispersion of disposal sites will never be attained if and when significant reductions in the generation of waste is achieved. The Western New York community will already be home to all of the capacity such reduced generation will require.

78. See, e.g., *Nat'l Solid Wastes Management Ass'n v. The Alabama Dep't of Env'tl. Management*, 910 F.2d 713 (11th Cir. 1990). In this case, Alabama's attempt to impose similar limits on hazardous waste importation into C.W.M.'s huge commercial disposal facility at Emelle, Alabama, was found to violate the Commerce Clause of the U.S. Constitution.

79. U.S. CONST. art. I, § 8, cl. 3.

80. It is noteworthy that C.W.M. has already challenged the recent D.E.C. permit limitations in Federal Court, in part on a Commerce Clause theory. See *Nat'l Solid Wastes Management Ass'n v. Jorling*, No. 90-1288A (W.D.N.Y. filed Dec. 18, 1990).

81. *Compare* *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) with *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

conservative United States Supreme Court majority, when ultimately confronted with such state action, will conclude that responsible attempts to ensure in-state disposal of locally-generated hazardous waste are acceptable.⁸² Alternatively, the minority of importing states may persuade Congress to expressly authorize such an equitable system.⁸³ In any event, until the question is authoritatively resolved, external pressures will continue to complicate efforts to limit the concentrated and expanding Western New York hazardous waste disposal industry.

III. POTENTIAL FOR SUCCESSFUL COMMUNITY OPPOSITION

The prognosis for the Western New York area, confronted with unwanted proposals to locate hazardous waste disposal facilities in the community, is at best guarded. The unwillingness of state government at all levels to even confront the issue of equitable geographic dispersal of facilities, the market forces driving expansion of existing commercial enterprises and the inequity of the state's siting process all unquestionably operate to diminish the effectiveness of local community opposition.

Notwithstanding such difficulties, however, community opposition must continue. If current proposals for such facilities are successful, future efforts to promote regional equity will be undermined. Indeed, if the proposed 100,000 ton annual capacity incineration complex in Niagara County is permitted and certified, all of the projected landfill requirements and commercial incineration disposal shortfall capacity identified in the D.E.C. Capacity Assurance Plan would be situated in Western New York.⁸⁴

While the playing field provided by the New York siting process is not a level one, community participation can be productive. Citizens living in areas threatened by the commercial hazardous waste disposal in-

82. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629, (1978) (Rhenquist, J., dissenting) (considering a restriction on interstate shipment of non-hazardous solid waste).

83. New York has recently joined thirteen states which are net importers of hazardous waste in forming an alliance called "States for Responsible and Equitable Waste Management." This group seeks to persuade Congress to adopt " 'a more equitable system for responsible management of hazardous waste' and [to] 'explor[e] the development of a CAP to include only those states demonstrating responsible waste management.' " *Regional Plan on Hazardous Waste Elusive*, GREAT LAKES REP., Nov.-Dec. 1990, at 3.

84. New York's October 17, 1989, *Capacity Assurance Plan* envisions 100% landfill capacity for New York State generated waste to be provided by C.W.M.'s Model City Facility. An incineration shortfall of 105,000 tons annually is identified by 1995. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, CAPACITY ASSURANCE PLAN, Table VI-6, at 6-17 (1989). The C.W.M. proposal for a 100,000 ton per year incineration complex at its Model City facility clearly would meet the projected shortfall.

dustry must ensure that local and county governments are aware of the situation and committed to resist unbridled expansion. Because meaningful participation in the process is so costly, public funds must be encumbered for this purpose. Hazardous waste disposal facilities are currently obligated to pay host communities a gross receipts tax.⁸⁵ Local citizens must aggressively act to ensure that a significant portion of these revenues are targeted to resist expansion, rather than becoming a necessary constituent of annual general operating receipts.⁸⁶

Efforts to ensure meaningful governmental involvement should not stop with the host communities. The problems associated with the commercial hazardous waste disposal industry are regional, and not local in their reach. The entire Western New York community must join together and pool available resources in cooperative opposition to current siting practices. On-going lines of inter-governmental communication must be created and a sharing of technical resources encouraged.⁸⁷

The possible dangers associated with a concentrated hazardous waste disposal industry in Western New York cross international boundaries as well. The Province of Ontario, in particular, suffers greatly from air and water pollution originating in Erie and Niagara Counties. The Ontario Ministry of the Environment has a long history of promoting the environment and protecting its citizens through active participation in U.S. environmental proceedings.⁸⁸ Continued Canadian involvement in

85. See N.Y. ENVTL. CONSERV. LAW § 27-0925 (McKinney Supp. 1991).

86. The Towns of Lewiston and Porter, by undertaking the significant expense of retaining counsel to resist C.W.M.'s incineration proposal, have followed this necessary route to effectively financing meaningful participation in the siting process.

87. In response to a request for assistance from Residents Organized for Lewiston-Porter's Environment, Inc. (R.O.L.E.), the Erie County Environmental Management Council filed extensive critical comments with D.E.C. in the public scoping process. (A copy is on file with the author.). On-going communication between R.O.L.E. and the Council continues.

88. As examples, Ontario successfully intervened in a U.S. Environmental Protection Agency action in New York State, *U.S. v. Hooker Chemicals and Plastic Corp.*, 101 F.R.D. 444 (W.D.N.Y. 1984), participated in a state implementation plan (SIP) variance proceeding under the U.S. Clean Air Act, see P. MULDOON, CROSS-BORDER LITIGATION: ENVIRONMENTAL RIGHTS IN THE GREAT LAKES ECOSYSTEM 254-71 (1986); participated in two SIP variance proceedings at the state level, see *id.*; obtained party status in a New York State Environmental Proceeding, see *id.* at 261-62; intervened in a review proceeding concerning the triggering of § 115 of the International Air Pollution Remedy under the U.S. Clean Air Act, *id.* at 173, 400-03; intervened in a New York Judicial Review Proceeding, *id.* at 37, 403-05; and intervened as *amicus curiae* in a Federal Court proceeding concerning an incinerator located in the State of Michigan, see *id.* at 215-33. Most recently, the Province of Ontario was granted full party status in the New York State Siting Board consideration of an application to expand an existing hazardous waste landfill in Niagara County, situated near the shores of the Niagara River. In the Matter of the Application of CECOS Int'l Inc., App. No. 90-88-9021 (Aug. 21, 1989) (granted full party status in the New York State Siting Board consideration of

the New York State administrative process could be determinative. Active employment of the sophisticated technical and engineering resources of the Ontario Ministry of the Environment at Siting Board hearings would unquestionably counterbalance the aggressive presentation of the applicant and ensure a factually complete and persuasive administrative record.⁸⁹

Community involvement in the siting process must extend beyond reliance upon local government. Municipal dependence upon gross receipts revenues may ultimately compromise the will of host community resistance. Effective citizen involvement is difficult, but not impossible. It requires identification and organization of available human resources and the development of sources of technical support.

The requisites and imponderables of effective community organization are beyond the limited scope of this paper. However, several observations can be offered based upon the experiences of those opposing C.W.M. in Niagara County. Common human experience suggests that a majority of citizens who reside in a community targeted for commercial hazardous waste disposal facilities do not favor such proposals. However, much of this opposition will be instinctive and unfocused. Existing local environmental groups must inform themselves as completely as possible concerning the relevant issues and undertake a community canvass of all residents. Such an undertaking serves many valuable purposes, including raising the sophistication of the community at large, identifying individuals who are willing to participate in the process and providing a reasonable assessment of community sentiment.

Effective citizen participation in the siting process can occur on several levels. The communication of public sentiment in opposition to the proposal is critical. Every meeting conducted by the D.E.C. should be well attended by opponents of the proposal. An effective message is conveyed if public interest is so intense that the number of citizens present exceeds the capacity of the hall. Given the limited and poorly publicized notice which precedes these meetings,⁹⁰ an effective notification system is critical. Opposition is also conveyed through public picketing and other

an application to expand an existing hazardous waste landfill in Niagara County, situated near the shores of the Niagara River, which played a critical role in defeating the CECOS proposal to further concentrate hazardous waste disposal facilities near the Niagara River).

89. On December 20, 1990, representatives from Residents Organized for Lewiston-Porter's Environment, Inc. (R.O.L.E.) corresponded with the Honorable Robert Rae, Premier of Ontario, and Ruth Grier, Minister of the Environment, in an effort to obtain Provincial participation in opposition to the C.W.M. incineration proposal.

90. See *supra* text accompanying note 15.

demonstrations. Identification and organization of individuals willing and able to participate in such activity is, of course, a necessary prerequisite.

The open and notorious communication of public opposition, while necessary, cannot be the only role for citizen involvement. The siting process for commercial hazardous waste disposal facilities is not democratic, and impacted citizens cannot vote up or down on pending proposals. Approval of facilities can and will occur despite strongly expressed public opposition. Citizen involvement in the siting process itself is therefore critical.⁹¹

As discussed above, siting decisions are reached in a complex administrative process dominated by large, well-funded applicants. Meaningful citizen participation requires access to technical support in such areas as disposal and emissions control technology, environmental health, transportation analysis, chemistry, risk assessment computer modeling, endangered species surveys and community planning and growth projections. Because the current New York State system fails to provide any technical assistance to targeted communities,⁹² significant efforts must be undertaken to identify and target alternative sources to fill this void.

In Western New York, the State University of New York at Buffalo (SUNY/Buffalo) is, without question, the only community-based institution which could provide the necessary technical support. Its faculty includes respected experts in most, if not all, of the relevant subject areas implicated in the siting process. Resources are available to support theoretical and field research. Moreover, such a role would not conflict adversely with the University's primary missions of education, scholarship, and public service.

Unfortunately, the local academic tradition runs counter to any such role. The only direct involvement of the University with the issue of commercial hazardous waste disposal is the SUNY/Buffalo, New York State Center for Hazardous Waste Management. Funded by New York State appropriations, the Center's major focus is on technologies.⁹³ As a result, there is an appearance and reality of a symbiotic, cooperative

91. In addition to formal, independent participation within the administrative process, citizen groups can fulfil other important functions in conjunction with counsel retained by impacted municipalities. "The citizens are the first line of fact-finding and issue-raising; they identify many of the defects in the site and in the proposal, and help set the agenda for the legal debate." Gerrard, *supra* note 19, at 26.

92. See *supra* text accompanying note 50.

93. See generally 1987 N.Y. Laws c.489, §§ 1-16, amended 1989 N.Y. Laws c.523, §§ 1-3, eff.

relationship with the hazardous waste disposal industry.⁹⁴ There is virtually no interface with the community most adversely affected by these technologies and the Center appears blissfully unconcerned with the policy ramifications of geographic concentration.⁹⁵

SUNY/Buffalo is an integral presence within the Western New York community with responsibilities to its citizens. As a necessary counterpoint to its involvement with hazardous waste disposal technologies and the commercial disposal industry through the Center, those responsibilities encompass the sharing of the University's vast and accumulated expertise with community-based opponents of the concentration of commercial disposal capacity in Western New York.

CONCLUSION

The concentration of commercial hazardous waste disposal facilities in Western New York is a community tragedy and a state-wide disgrace. Real dangers are presented by the transportation, handling and disposal of hazardous waste. Accidents can and do occur. The concentration of disposal capacity in one community only enhances these dangers; to say nothing about deflated property values and stagnant development opportunities.

Citizens cannot look to State or Federal functionaries for assistance. The concentration of facilities is, in large part, the result of the malignant neglect of elected officials and regulators charged with ensuring fairness and safety. Expediency and shared skepticism regarding the availability of realistic siting alternatives combine to ensure that the state will continue to treat Western New York as a sacrificial dumping site for New York's hazardous waste.

Jul. 16, 1989. (N.Y. ENVTL. CONSERV. LAW § 27-0900 [McKinney Supp. 1991], Historical & Statutory Notes).

94. On October 8 and 9, 1990, the Center sponsored its first Hazardous Waste Treatment and Prevention Technologies Conference in Niagara Falls, New York. The conference concerned what is euphemistically referred to as thermal destruction technology. Presenters were comprised primarily of industry engineers and government regulators, and included a representative of C.W.M. who unabashedly touted the air pollution control technology which is proposed for the Model City incineration facility. Conference attendees were drawn almost exclusively from the hazardous waste disposal industry and no citizen participation was solicited or provided for. *See generally* Spectrum, Oct. 29, 1990, at 5, col. 1 (Open letter to President Steven B. Sample from R. Nils Olsen, Jr.).

95. *See generally* MacClennan, *Hazardous Waste Center at UB Shuts Out the Public*, Buffalo News, Oct. 21, 1990, at H-12, col. 1. The stance of the Center for Hazardous Waste Management stands in marked contrast to that of the Center for the Biology of Natural Systems at Queens College, City University of New York, which has been very active in providing technical assistance to community-based environmental groups. Similar activities have been undertaken by Hunter College's Community Environmental Health Center.

Until the executive, legislative and regulatory branches of New York State accept their responsibility to grapple honorably with the intractable policy issues of ethical siting of commercial hazardous waste disposal facilities, primary responsibility for halting the current rush towards geographic concentration must be accepted by the Western New York community. Citizens must not fall into a sense of hopelessness and inevitability. While the siting process is skewed in favor of the large commercial applicant, effective participation is possible. Impacted municipalities must shoulder the bulk of the load because participation in the process is costly. Qualified and experienced attorneys must be retained. Community groups must undertake efforts to identify and mobilize local resources to provide necessary technical support to partially offset the applicant's disproportionate resources. A dignified and meaningful role for those most affected by the siting decision can begin to redress the inequity of current practices.